U.S. Department of Labor

Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 565-5330
(202) 565-5325 (FAX)

NOTICE: This is an electronic bench opinion which has not been verified as official.

Date: February 3, 1999
Case No.: **98 INA 226**

In the Matter of:

MEMC ELECTRONIC MATERIALS, Employer,

on behalf of

GERD PFEIFFER, Alien

Appearance: A. G. Carr, III, Esq., of St. Louis, Missouri, for Employer and Alien
Certifying Officer: Dolores DeHaan, Region II.

Before : Huddleston, Jarvis, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from the labor certification application that MEMC ELECTRONIC MATERIALS ("Employer"), filed on behalf of GERD PFEIFFER ("Alien"), under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a)(5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. The Certifying Officer ("CO") of the U.S. Department of Labor at New York, New York, denied the application, and the Employer requested review pursuant to 20 CFR § 656.26.[1]

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c). Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor. [1]

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work that (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

STATEMENT OF THE CASE

On May 25, 1995, the Employer filed for alien labor certification on behalf of the Alien to fill the position of "SOI Physicist" in connection with its Business Activity, the "Manufacture and Sale of Electronic Grade Silicon Rods and Wafers." [2] The position offered was classified as "Physicist" under DOT Occupational Code No. 023.061-014.[3] The salary offered was $52,000 per year for a forty hour week, with hours from 8:30 A.M. to 5:00 P.M., no overtime. The education required was completion of a doctorate in the Major Field of Study of Physics. AF 45, Item 14. In addition, the Employer required experience consisting of two years in the Job

---

[2] The Employer set out the following duties to Describe Fully the Job to be Performed at Box 13 of ETA Form 750A at AF 45: "Conduct research and analysis to demonstrate the applicability and desirability of Silicon-on-Insulator ("SOI") structures to the ULSI integrated circuit industry. Conduct experiments involving the latest state-of-the-art technology, with no or only very limited supervision or technical support. Conduct experiments to study the topography of both the silicon and the buried oxide layer in SOI wafers based on optical reflectance and interference measurement methods and X-Ray techniques. Design and create electronic device structures on SOI layers, and analyze these structures for performance, charge carrier density, and lifetime. Analyze defects and impurity gettering in SOI films, and conduct studies of both the buried oxide underneath the silicon device layer and the gate oxide layer fabricated on top of the SOI structures. Perform experiments and create sample structure to demonstrate the applicability of SOI to micromechanical applications. Perform experiments and create sample structure to demonstrate the applicability of SOI to mechanical applications. Conduct experiments and designs using the capacitance measurement techniques, Deep Level Tranxsient Spectroscopy ("DLTS"), and preparation of DLTS sample structures, including cleaning, etching, lithography, ohmic and Schottky contacts, hydrogen passivation, and selected impurity diffusion techniques. Correlate results of experiments and designs with other contract agents working on TEM, SIMS, and surface topography studies. Create and coordinate presentations of the data generated from these experiments and designs to customers, in both written and oral forums."

[3] 023.061-014 **PHYSICIST** (profess. & kin.) Conducts research into phases of physical phenomena, develops theories and laws on basis of observation and experiments, and devises methods to apply laws and theories of physics to industry, medicine, and other fields: Performs experiments with masers, lasers, cyclotrons, betatrons, telescopes, mass spectrometers, electron microscopes, and other equipment to observe structure and properties of matter, transformation and propagation of energy, relationships between matter and energy, and other physical phenomena. Describes and expresses observations and conclusions in mathematical terms. Devises procedures for physical testing of materials. Conducts instrumental analyses to determine physical properties of materials. May specialize in one or more branches of physics and be designated Physicist, Acoustics (profess. & kin.); Physicist, Astrophysics (profess. & kin.); Physicist, Atomic, Electronic And Molecular (profess. & kin.); Physicist, Cryogenics (profess. & kin.); Physicist, Electricity And Magnetism (profess. & kin.); Physicist, Fluids (profess. & kin.). May be designated: Physicist, Light And Optics (profess. & kin.); Physicist, Nuclear (profess. & kin.); Physicist, Plasma (profess. & kin.); Physicist, Solid Earth (profess. & kin.); Physicist, Solid State (profess. & kin.); Physicist, Thermodynamics (profess. & kin.). *GOE: 02.01.01 STRENGTH: L GED: R6 M6 L6 SVP: 8 DLU: 77*

Offered or two years and six months in the Related Occupation of Research Physicist.[4] AF 44.[5]

First Notice of Findings.[6] In the January 28, 1997, Notice of Findings ("NOF") the CO concluded that the Employer failed to establish that its wage offer equalled or exceeded the prevailing wage, citing 20 CFR § 656.20(c)(2).[7] AF 70-71.[8] The CO found Employer's wage offer of $52,000 to be less than the prevailing wage of $70,413.33, as determined by the state employment security agency survey of "Physicist Electronic Manufacturing and Research." The NOH summarized the CO's analysis of the state agency survey included findings as to the method used under 20 CFR § 656.40.[9] Comparing the state agency survey with the Employer's

---

[4] The Employer added the following to supplement to its description of the Related Occupation. [Research Physicist] researching and analyzing defects in high-tech semiconductor materials, including electrical characterization using DLTS, CV and IV measurement techniques; designing, preparing and creating test structures by (1) cleaving, polishing and etching of silicon crystals and forming electrical contacts, and (2) using lithography and wire bonding techniques; investigating the influence of transition metal impurities on the properties of silicon and assessing its implications for microelectronic applications; introducing metal impurities via selective diffusion, investigating their interaction with defects and reactions with atomic hydrogen and correlating the results with optical measurements including photoluminescence, infrared spectroscopy and electron microscopy, using capacitance techniques to investigate properties and stability of wafer bonded silicon/silicon oxide structures used for micromechanical applications; analyzing and interpreting experimental data to present conclusions at international meetings or for publication in scholarly and technical journals.

[5] **The Alien**. A national of Germany, the Alien was born in 1962. In 1984 the Claimant graduated college in Germany, where his Field of Study was Physics. He earned a Doctorate in Physics at North Carolina State University in 1991. The Alien was working in the United States under an H-1B visa and living at Fishkill, New York, on the date of application. The Alien was employed as a Research Assistant by the North Carolina State University from 1985 to 1991. When he worked as a Research Physicist from 1991 to 1994 for the Max Planck Institute for Solid State Research in Stuttgart, Germany, his duties were similar to the Job Duties in the application. From 1994 to the date of application he worked for the Employer in the Job Offered. AF 141.

[6] **20 CFR § 656.25(c)** If a labor certification is not granted, the Certifying Officer shall issue to the employer, with a copy to the alien, a *Notice of Findings*, as defined in §656.50. The *Notice of Findings* shall: (1) Contain the date on which the *Notice of Findings* was issued; (2) State the specific bases on which the decision to issue the *Notice of Findings* was made; (3) Specify a date, 35 calendar days from the date of the *Notice of Findings*, by which documentary evidence and/or written argument may be submitted to cure the defects or to otherwise rebut the bases of the determination, and advise that if the rebuttal evidence and/ or argument have not been mailed by certified mail by the date specified.

[7] **20 CFR § 656.20(c)** "Job offers filed on behalf of aliens on the *Application for Alien Employment Certification* form must clearly show that: ... (2) The wage offered equals or exceeds the prevailing wage determined pursuant to §656.40, and the wage the employer will pay to the alien when the alien begins work will equal or exceed the prevailing wage which is applicable at the time the alien begins work..."

[8] "SESA" refers to the State Employment Security Agency, which is identified at 20 CFR § 656.3. It is the "local office" in 20 CFR § 656.21(e): "The local office shall calculate, to the extent of its expertise using wage information available to it, the prevailing wage for the job opportunity pursuant to §656.40 and shall put its finding into writing. If the local office finds that the rate of wages offered is below the prevailing wage, it shall advise the employer in writing to increase the amount offered. If the employer refuses to do so, the local office shall advise the employer that the refusal is a ground for denial of the application by the Certifying Officer; and that if the denial becomes final, the application will have to be refiled at the local office as a new application." Also see 20 CFR § 656.20(c)(2).

[9] As the job at issue was located in Hopewell Junction, New York, there was no dispute as to the area where the prevailing wage survey was to be focused.

evidence of a survey by Abbot Langer[10], the CO said, "Employer's Abbott Langer survey does not appear to represent the area of intended employment. New York State's survey, however, represents the **area of intended employment**." (Emphasis as in the original). By way of rebuttal, the Employer was told either to increase the salary offer to equal or exceed the prevailing rate of pay or to "submit countervailing evidence that the prevailing wage determination is in error and that the Employer's wage offer equals or exceeds the correct prevailing rate." AF 70.

First Rebuttal. On March 1, 1997, the Employer filed a rebuttal that consisted of argument by counsel, who attacked the construction of 20 CFR § 656.20(c)(2) in the NOF, contending that the CO failed to comply with DOL General Administration Letter 4-95 of May 18, 1995.[11] AF 75, and see 92-107 for text of GAL. Employer contended that the place of intended employment was located in Dutchess County, which is a Primary Metropolitan Statistical Area ("PMSA"). Employer then argued that 20 CFR § 656.3 defined the area of intended employment as "the area within normal commuting distance of the place (address) of intended employment." The Employer first asserted that the state employment security agency "unilaterally extended the 'area of intended employment' to include the CMSA of greater New York City (and vicinity) in flagrant violation of these regulations and GAL 4-95." AF 74. [12] Employer then argued that the survey by Abbot, Langer and Associates does, in fact, represent the area of intended employment, contrary to the apparent finding of the state employment security agency, adding that the CO is required to provide the reasons for relying on the prevailing wage survey by the state agency, rather than on the prevailing wage survey the Employer presented.

Second Notice of Findings. The NOF filed by the CO on July 8, 1997, again rejected the application and notified the Employer of the rebuttal it must offer, again explaining that Employer's wage offer was below the prevailing wage as determined by the state employment security agency survey of "Physicist Electronic Manufacturing and Research."
The CO found that this survey fully met the criteria of expanding the area of intended employment as specified in GAL 4-95, which said, "SESA's can also survey jobs outside the area of intended employment if a sufficient number of employers fail to respond to a survey to provide a reliable prevailing wage determination." In such a case, where the average rate of wages paid workers in the occupation could not be determined in the area of intended employment, "the geographical area of consideration should not be expanded more than is necessary to obtain a representative number of employers employing workers in the occupation for which the determination is to be made." "For example," continued GAL 4-95, "it is appropriate to survey cities and counties that are in close proximity to the area of intended employment rather than using a State-wide average wage rate." AF 116. The CO then explained that the state agency could only obtain wage data for the subject occupation from two employers in the Dutchess County PMSA. As the state agency policy requires that prevailing wage

---

[10] "Abbott Langer" refers to Abbot, Langer and Associates, a firm that performed a survey in behalf of the Emplyer, to which reference will hereinafter be made.

[11] A General Administration Letter of a division of the U. S. Department of Labor is a "GAL." This will be abbreviated in all references hereinafter..

[12] CMSA is a Consolidated Metropolitan Statistical Area.

determination be based on more than two responding employers in order to provide a reliable result, it was consistent with GAL 4-95 that the area of intended employment be expanded to a degree that was no more than necessary to accomplish the objectives of 20 CFR § 656.40.[13] Consequently, the area of the state agency PMSA survey was expanded to encompass the New York PMSA, which was geographically contiguous to the area of intended employment, and the Dutchess County PMSA, which the CO expressly found did not constitute a Consolidated Metropolitan Statistical Area, based on the criteria explained in GAL 4-95. The NOF then explained that the Abbot Langer survey was a statewide average wage rate, and that the state agency's survey complied more closely with the criteria of GAL 4-95 than did the Abbot Langer survey because (1) the Employer's survey expanded the area under consideration to a degree that was greater than necessary, and (2) the Employer's wage rate survey did not distinguish between entry level and experienced employees. The NOF then restated the Employer's alternatives in rebuttal. AF 115-116.

Second Rebuttal. The Employer's Second Rebuttal dated August 8, 1997, addressed the issue stated in the NOF, essentially repeating arguments it addressed to the state agency's survey. Employer's rebuttal consisted of its statement of position and included as exhibits the application, and the state agency's prevailing wage determination and request form. AF 118-132.[14] Noting that the state agency survey considered a broader area than Dutchess County, the Employer protested that the definition of "similarly employed in 20 CFR 656.40(b)(2) forbade the consideration of positions outside of the area of intended employment unless there were no substantially comparable jobs in the area of intended employment.[15] Employer then said there

---

[13] 20 CFR §656.40 Determination of prevailing wage for labor certification purposes.(a) Whether the wage or salary stated in a labor certification application involving a job offer equals the prevailing wage as required by §656.21(b)(3), shall be determined as follows: (1) If the job opportunity is in an occupation which is subject to a wage determination in the area under the Davis-Bacon Act, 40 U.S.C. 276a et seq., 29 CFR part 1, or the McNamara-O'Hara Service Contract Act, 41 U.S.C. 351 et seq., 29 CFR part 4, the prevailing wage shall be at the rate required under the statutory determination. Certifying Officers shall request the assistance of the DOL Employment Standards Administration wage specialists if they need assistance in making this determination. (2) If the job opportunity is in an occupation which is not covered by a prevailing wage determined under the Davis-Bacon Act or the McNamara-O'Hara Service Contract Act, the prevailing wage for labor certification purposes shall be: (i) The average rate of wages, that is, the rate of wages to be determined, to the extent feasible, by adding the wage paid to workers similarly employed in the area of intended employment and dividing the total by the number of such workers. Since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or (ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes. (b) For purposes of this section, "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment," except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" shall mean: (1) "Having jobs requiring a substantially similar level of skills within the area of intended employment"; or (2) If there are no substantially comparable jobs in the area of intended employment, "having substantially comparable jobs with employers outside of the area of intended employment." (c) A prevailing wage determination for labor certification purposes made pursuant to this section shall not permit an employer to pay a wage lower than that required under any other Federal, State or local law.

[14] The state agency said the indicated prevailing wage was for a Physicist 5, based on the weighted average for the New York consolidated metropolitan area, citing as its source Wyatt Professional & Scientific for 1995-1996. AF 119

[15] In describing the method by which the CO shall determine the prevailing wage for the purposes of 20 CFR § 656.21(b)(3), the regulations provide at 20 CFR 656.40(a)(2) that the prevailing wage for labor certification purposes shall be the average rate of wages, which shall be determined to the extent feasible by adding the wage paid to workers

were, in fact, two employers of physicists in Dutchess County. Consequently, the state agency's weighing of additional employers of physicists was contrary to 20 CFR § 656.40(b)(2), and its survey was not definitive of the prevailing wage issue. Employer argued that the "survey area can only be legitimately expanded if there are **no** substantially comparable jobs, and the employer-applicant is the **only** employer of similarly situated employees" within the designated geographical area. (Emphasis as in the original at AF 131.)

The Employer further noted that the NOF failed to address its assertions, citing BALCA decisions. Employer said the Abbot Langer survey was published January 1996, containing data effective August 1995. The Employer said this authority indicated that the salary range for Research Physicists outside all major metropolitan areas in New York State was between $35,000 and $40,000 a year, and that its offer of $52,000 "far exceeds the wage information available for this position in Dutchess County. Although Employer conceded that an employer challenging a prevailing wage determination bears the burden of establishing that the wage determination is in error, the Employer contended that it had demonstrated that the DOL's wage survey was in error and that the wage offered in the application exceeded the correct prevailing wage. The Employer then concluded that the state agency survey was "null and void" because the CO had failed to sustain the burden to demonstrate why the state agency's survey should be applied instead of the employer's survey.

Final Determination. After considering Employer's Second Rebuttal, addressed to the Second NOF, the CO denied certification in the Final Determination, dated October 3, 1997. AF 138-139. The CO explained that the Abbott Langer survey published a statewide average salary rate, while the state agency survey more closely complied with General Administration Letter No. 4-95 direction to avoid expanding the area under consideration more than is necessary. Moreover, the CO said, Employer's survey failed to distinguish between entry level and experienced level employees. The CO then rejected Employer's argument that 20 CFR § 656.40(b)(2) prevented the expansion of the geographic area survey to cases where no substantially comparable jobs whatsoever exist in the survey area otherwise defined by the regulation, citing instructions in DOL Technical Assistance Guide that the survey should extend the geographical area of consideration to include an adequate number of employees in the same labor market, if there are not enough employers in the local area. The CO added that this manual also said, "Every attempt should be made to obtain data from enough sources to reflect a representative sampling of employers and workers in the area of intended employment," quoting similar instructions in GAL 4-95.

---

similarly employed in the area of intended employment and dividing the total by the number of such workers. The regulation further said that, since it is not always feasible to determine such an average rate of wages with exact precision, the wage set forth in the application shall be considered as meeting the prevailing wage standard if it is within 5 percent of the average rate of wages; or (ii) If the job opportunity is covered by a union contract which was negotiated at arms-length between a union and the employer, the wage rate set forth in the union contract shall be considered as not adversely affecting the wages of U.S. workers similarly employed, that is, it shall be considered the "prevailing wage" for labor certification purposes. The regulation continued, "(b) For purposes of this section, 'similarly employed' shall mean 'having substantially comparable jobs in the occupational category in the area of intended employment,' except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" shall mean: (1) 'Having jobs requiring a substantially similar level of skills within the area of intended employment;' or (2) If there are no substantially comparable jobs in the area of intended employment, 'having substantially comparable jobs with employers outside of the area of intended employment.'"

The CO explained that the state agency survey covered both the Dutchess County and the New York City areas, that the Employer's survey was based on five positions, including Buffalo and four unidentified places outside of the major metropolitan areas of the State of New York. Because the state agency survey more closely followed the DOL policy criteria discussed above, the CO concluded that it was better applicable to the facts presented by this application. Certification was denied because the Employer failed to sustain the burden of proof that its wage offer equaled or exceeded the correct prevailing rate.

Appeal. The Employer appealed to BALCA on November 3, 1997. AF 143-150. The Employer argued that the CO was in error because the state agency wage survey unlawfully expanded the area of intended employment and the definition of "similarly employed" in violation of 20 CFR §§ 656.21(b)(3) and 656.40(b)(2), and GAL No. 4-95. Employer's appeal turned on its contention that the provisions of 20 CFR § 656.40 expressly excluded the consideration of the any area outside Dutchess county in the wage survey, as explained *supra* in its second rebuttal.

Discussion

Burden of proof. The Employer's reference to the burden of proof at AF 125 is not correct. In all proceedings under the Act and implementing regulations, the Employer must present the evidence and carry the burden of proof as to all of the issues arising under its application for alien labor certification, notwithstanding its construction of the holdings in various cases addressing the prevailing wage regulations.[16] The imposition of the burden of proof is based on the fact that labor certification is an exception to the general operation of the Act, by which Congress provided favored treatment for a limited class of alien workers whose skills were needed in the U. S. labor market. 20 CFR §§ 656.1(a)(1) and (2), 656.3 ("Labor certification"). 20 CFR § 656.2(b) quoted and relied on § 291 of the Act (8 U.S.C. § 1361) to implement the burden of proof that Congress placed on applicants for alien labor certification.[17]

Area of intended employment. The issue turns on the area surveyed by the state agency in determining the level of the prevailing wage that the employer was required to offer in recruiting for the job offered under 20 CFR § 656.21(g)(4). In weighing the state agency's survey against the survey by the Employer, the CO gave greater weight to the survey by the state agency for the reasons explained in the First and Second NOF. After considering the text of the regulations for clarification of the term "area of intended employment," the CO turned to GAL

---

[16] Moreover, the Panel is required to construe this exception strictly, and to resolve all doubts against the party invoking this exemption from the general operation of the Act. 73 Am Jur2d § 313, p. 464, citing **United States v. Allen**, 163 U. S. 499, 16 SCt 1071, 1073, 41 LEd 242 (1896).

[17] "Whenever any person makes application for a visa or any other documentation required for entry, or makes application for admission, or otherwise attempts to enter the United States, the burden of proof shall be upon such person to establish that he is eligible to receive such visa or such document, or is not subject to exclusion under any provision of this Act... ." The legislative history of the 1965 amendments to the Immigration and Nationality Act establishes that Congress intended that the burden of proof in an application for labor certification is on the employer who seeks an alien's entry for permanent employment. See S. Rep. No. 748, 89th Cong., 1st Sess., reprinted in 1965 U.S.D. Code Cong. & Ad. News 3333-3334.

4-95, which said that

> A determination of the normal commuting distance is not necessary for places of employment within an MSA since any place within an MSA is deemed to be within normal commuting distance. Although not specifically mentioned in the definition of "area of intended employment," any place within a Primary Metropolitan Statistical Area (PMSA) is also deemed to be within normal commuting distance of the place of intended employment, since PMSA's are derived from the largest MSA's. If the place of employment is not within the boundaries of an MSA or PMSA, a determination as to the normal commuting distance must be made based on the SESA's knowledge of commuting practices in the area.

AF 101-102. While on its face these instructions clearly broaden the discretion of the CO to make a finding that is based on an evaluation of Employer's application in the context of the practices common to the labor market in this region in the course of implementing 20 CFR § 656.40, the Employer contends that the terms of this subsection limit the application of GAL 4-95, based on its construction of 20 CFR § 656.40(b)(2). As the Employer's notion of the meaning of 20 CFR § 656.40(b)(2) is inconsistent with the CO's interpretation, its request for certification turns on the Panel's application of the subsection to the evidence of record.

First, the object of 20 CFR § 656.40 is to make a wage survey of workers similarly employed in the area of intended employment in order to derive a useful statistic, the average rate of their wages for alien labor certification purposes. 20 CFR § 656.40(a)(2)(i). The critical element for which the Secretary of Labor provided a definition was "similarly employed," which 20 CFR § 656.40(b) said means "having substantially comparable jobs in the occupational category in the area of intended employment." While the meaning of "substantially comparable jobs" was not questioned, the phrase pivotal to Employer's case is "[i]n the area of intended employment." Before addressing its usage in 20 CFR § 656.40, it is first observed that the concept was defined at 20 CFR § 656.3 as a definition adopted for purposes of Part 20:

> *Area of intended employment* means the area within normal commuting distance of the place (address) of intended employment. If the place of intended employment is within a Metropolitan Statistical Area (MSA), any place within the MSA is deemed to be within normal commuting distance of the place of intended employment.

20 CFR § 656.40(b), however, provided the more elaborate definition on which Employer's case rests:

> (b) For purposes of this section, "similarly employed" shall mean "having substantially comparable jobs in the occupational category in the area of intended employment," except that, if no such workers are employed by employers other than the employer applicant in the area of intended employment, "similarly employed" shall mean: (1) "Having jobs requiring a substantially similar level of skills within the area of intended employment"; or (2) If there are no substantially comparable jobs in the area of intended employment, "having substantially comparable jobs with employers outside of the area of intended employment."

The assumed conflict between 20 CFR § 656.3 and 20 CFR § 656.40(b) must be resolved in order to apply these regulations to this application. It is well established that a regulation must be so construed as to give meaning to all of its parts, if possible. **FAA Administrator, v. Robertson**, 422 U. S. 255, 95 SCt 2140, 45 LEd2d 164(1975); and see also **Rosado v. Wyman**, 397 U.S. 397, 90 SCt 1207, 25 LEd2d 442 (19--). As the United States Supreme Court explained in **Administrator, FAA v. Robertson**, 422 U.S. 255, 95 SCt 2140, 45 LEd2d 164(1975), "It is axiomatic that all parts of an act,if at all possible, are to be given effect. **Weinberger v. Hynson, Westcott & Dunning, Inc.**, 412 U.S. 609, 93 SCt 2469, 37 LEd2d 207(1973); accord **Kokoszka v. Belford**, 417 U.S. 642, 650, 94 SCt 2431, 2436, 41 LEd2d 374(1974)." In this regard the Court has held that where a reasonable construction gives effect to all of an act's provisions, the Court will not adopt a strained reading which renders one part redundant. **Jarecki v. G.D. Searle, & Co.**, 367 U.S. 303, 81 SCt 1579, 6 LEd2d 859(1961). This is consistent with the principle that statutes will not be held to be repugnant to each other, if they can be reconciled. **Montgomery Charter Service, inc. v. Washington MAT Commission**, 117 U.S. App D.C. 34, 325 F2d 230, 234 (1963); accord **Maiatico v. U.S.**, 112 U.S. App. D.C. 295, 302 F2d 880(1962). Consequently, the preferred interpretation will permit both regulations to stand where a seeming conflict appears, **Korte v. U.S.**, 260 F2d 633, 636(1959); and these regulations shall be so construed as to harmonize and reconcile their provisions in order that both of them will be fully effective. **Brotherhood of Locomotive Firemen & Enginemen v. Northern Pacific Ry Co.**, 274 F2d 641(1960). To begin to resolve the suggested conflict in the construction of 20 CFR § 656.3 and 20 CFR § 656.40(b), it is appropriate to follow the guidance of the U.S. District Court Judge who said, "It is elementary that a statute is to be read in the light of the problems it was designed to resolve, and the Court must find every intendment in favor of the validity of the Act and necessary to its purpose." **Jones v. District of Columbia**, 212 FSupp 438 , 443 (1962).

The Employer's rebuttal and appellate arguments argued that the state agency survey considered a broader area than Dutchess County on grounds that 20 CFR § 656.40(b)(2) expressly mandated that the CO could not consider the wages paid in positions outside of the area of intended employment unless there were no substantially comparable jobs in the area of intended employment whatsoever. We do not agree.

The normal commuting distance. While the object of the regulations relating to prevailing wage was to determine whether the wages paid for jobs in the subject occupational category that were substantially comparable to the job offered, there was no dispute as to the nature of the Job Offered and jobs in the occupational category. The entire dispute turned on the identity of the area of intended employment, which 20 CFR § 656.3 defined as the area within normal commuting distance of the place where the intended employment was to be performed. It was a given premise that, if the place of intended employment is within a Metropolitan Statistical Area (MSA), any location within that MSA was defined as within normal commuting distance of the place of intended employment. Consequently, the primary criterion governing the scope of the area of intended employment was to be the normal commuting distance between the address where the job was located and all points in the area of intended employment. While 20 CFR 20 CFR § 656.40(b)(1) defined the case where there were similarly employed workers with substantially comparable jobs in the occupational category employed by employers other than the employer applicant in the area of intended employment, subsection (2) addressed the case where no workers in substantially comparable jobs in the area of intended employment were found.

The Metropolitan Statistical Area. Employer mistakenly argued that because two employers of workers in substantially comparable jobs were found in Dutchess County in this case, a Metropolitan Statistical Area, the CO limited by 20 CFR 656.40(b)(2) to a comparison of its wage offer to the wages those two employers were paying workers employed by them in substantially comparable jobs. The reason is that 20 CFR § 656.3 broadly defined the area of intended employment as the area within normal commuting distance of the address of the location where the employee will work. The Metropolitan Statistical Area is not definitive and other evidence may be considered within the discretion of the CO for this purpose. As the Board explained in **Seibel & Stern**, 90 INA 086(Apr. 26, 1990), an MSA is defined a county or group of contiguous counties which contain at least one central city of at least 50,000 inhabitants or a central urbanized area of at least 100,000. Counties contiguous to the one containing such a city or area are included in an MSA, if they are essentially metropolitan in character and are socially and economically integrated with the central city. Moreover, GAL 4-95 said,

> If the place of employment is not within the boundaries of an MSA or PMSA, a determination as to the normal commuting distance must be made based on the SESA's knowledge of commuting practices in the area.

Supra.

Summary. As the Employer did not offer evidence that challenged the state agency's knowledge of commuting practices in the area, the Panel does not find this element of its wage survey to be the source of any defect. While the DOL Technical Assistance Guide does not limit the findings of this Panel, as a helpful indicator of the practical steps that the CO should take in complying with this regulation it said that the geographical area considered in the survey should include an adequate number of employees in the same labor market. The DOL Technical Assistance Guide added that every attempt should be made to obtain data from enough sources to reflect a representative sampling of employers and workers in the area of intended employment, if there are not enough employers in the local area. In this case, the survey by the state employment security agency covered the Dutchess County and the New York City areas, both of which were clearly contiguous as contemplated by the GAL 4-95 instructions. The Employer's survey, on the other hand, was based on five unidentified locations, which were not shown to be contiguous, and which the Employer failed to show to be within normal commuting distance from the worksite of the job offered in its application for alien labor certification. **Se Jin Auto Repair and Body Shop**, 94 INA 625 (Aug. 16, 1996).

Conclusion. It follows from these findings, that the Employer failed to sustain its burden of proof because it did not establish that the CO used the incorrect Metropolitan Statistical Area. **Ann Richman**, 93 INA 013(Mar. 21, 1994). As the record supported the CO's finding that the state employment security agency survey more closely followed the DOL policy criteria and was more applicable to the facts presented by this application than was the Employer's survey, the CO's conclusion that the Employer's survey was not persuasive was clearly based on the evidence. **F. L. Tarantino & Sons Quakertown Memorials**, 90 INA 231 (Jun. 13, 1991); **Sumax Industries**, 90 INA 502 (Dec. 4, 1991). Consquently, we find that the CO correctly denied certification because the Employer failed to sustain the burden of proof that its wage offer equaled or exceeded the correct prevailing rate.

The Panel concludes that the NOF provided sufficient notice of the reasons for the denial

of certification, and that it told the Employer how to cure the defects found in the application. As the Employer's rebuttal failed to sustain the burden of proof, the evidence supports the CO's denial of labor certification under the Act and regulations. Accordingly, the following order will enter.

ORDER

The decision of the Certifying Officer denying certification under the Act and regulations is affirmed.

For the Panel:

_____

FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Docket No. 98 INA 226
MEMC ELECTRONIC MATERIALS, Employer,
GERD PFEIFFER, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Jarvis			
Huddleston			

Thank you,

Judge Neusner

Date: November 10, 1998